No. 09-160

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,
PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Case: Page

CIA v. *Sims*, 471 U.S. 159 (1985) 3, 5

Statutes:

Freedom of Information Act, 5 U.S.C. 552:

5 U.S.C. 552(b)(1) 4, 5

5 U.S.C. 552(b)(3) 5

5 U.S.C. 552(b)(7) 3, 7, 8

5 U.S.C. 552(b)(7)(D) 3, 7

5 U.S.C. 552(b)(7)(F) ..... *passim*

5 U.S.C. 552(b)(7)(F) (1982) 3

Privacy Act, 5 U.S.C. 552a 3

Miscellaneous:

Executive Order 12,958, as amended, 68 Fed. Reg. 15,315 (2003) 4

130 Cong. Rec. 3502 (1984) 6

131 Cong. Rec. (1985):

pp. 247-248 9

p. 248 8

p. 253 9

132 Cong. Rec. (1986):

p. 26,769 7

p. 26,771 7

p. 29,616 9

p. 29,619 7

pp. 31,423-31,424 9

S. 774, 98th Cong., 1st Sess. (1983) 8

Miscellaneous—Continued: Page

S. Rep. No. 221, 98th Cong., 1st Sess. (1983) 6

In the Supreme Court of the United States

No. 09-160

UNITED STATES DEPARTMENT OF DEFENSE, ET AL., PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

The court of appeals has affirmed an order directing the public disclosure of records that, in the judgment of the President of the United States and the Nation's highest-ranking military officers responsible for ongoing combat operations in Iraq and Afghanistan, would pose a significant risk to the lives and physical safety of United States and Coalition personnel. Respondents do not dispute the accuracy of that judgment. Indeed, respondents' brief in opposition, like the decision of the court of appeals (Pet. App. 9a-10a & n.3), assumes that the court-ordered disclosure in this case "could reasonably be expected to endanger" the lives and physical safety of many individuals, both military and civilian, overseas. 5 U.S.C. 552(b)(7)(F). Respondents nonetheless contend that disclosure is required. They defend the Second Circuit's interpretation of Exemp-

tion 7(F)—which applies when the disclosure of law-enforcement records "could reasonably be expected to endanger the life or physical safety of any individual" (*ibid.*)—on the ground that the words "any individual" require the government to "identify at least one individual with reasonable specificity" and show that disclosure "could reasonably be expected to endanger that individual," Pet. App. 18a. That novel restriction cannot be squared with Exemption 7(F)'s text, purpose, or legislative history. Pet. 16-30.

Exemption 7(F) broadly encompasses danger to "any individual," with no suggestion of the Second Circuit's extra-textual specificity requirement. Respondents quote extensively from the court of appeals' decision but ignore much of the government's petition showing the court's statutory construction to be flawed. Indeed, their own defense of the court's decision underscores several of its analytical errors. Those errors, if uncorrected, would place American personnel at significant risk of death and injury. Before those risks are borne by the Nation's service members and others in harm's way, this Court should review the decision of the court of appeals.

1. As the petition explains (Pet. 16-25), nothing in Exemption 7(F) supports the court of appeals' requirement that the government "identify at least one individual with reasonable specificity" and show that disclosure "could reasonably be expected to endanger that individual," Pet. App. 18a.

a. Respondents contend (at 9-10) that the court's victim-specificity requirement is necessary to give content to "any individual." But that phrase *has* content—just not the content that the court of appeals imported. Congress exempted from FOIA's requirements certain records whose disclosure would imperil the "life or physical safety" of "any" natural person (*i.e.*, "individual"), not some partic-

ular person or subcategory of persons. That conclusion is reinforced by Congress's decision in 1986 to substitute "any individual" for the prior term "law enforcement personnel" (5 U.S.C. 552(b)(7)(F) (1982))—an amendment designed to expand Exemption 7(F)'s protection from only some individuals to all individuals facing serious danger. Pet. 20-21, 26, 28.

Respondents quote (at 10-11) the court of appeals' statement that its victim-specificity requirement is appropriate because it results in a "narrower construction" of Exemption 7(F). That reasoning is doubly flawed. It ignores the "practical approach" required by this Court to give FOIA's exemptions "meaningful reach and application." Pet. 23-24. And critically, the court's reasoning fails to ground the interpretation of Exemption 7(F) in FOIA's text. Even respondents admit (at 10 n.7) that Exemption 7(F) does not require at-risk individuals to be "named" because the relevant statutory language does "not read 'any *named* individual.'" Respondents fail to recognize that restricting the exemption to "any *named* individual" is a "narrower construction" in precisely the same way that limiting it to "any *identifiable* individual" is. Neither restriction has any foundation in the words of the statute.

Moreover, Congress's explicit focus on "identifiable individual[s]" in the Privacy Act (Pet. 18) and Congress's emphasis elsewhere in FOIA Exemption 7 on the "identity" of individuals who are confidential sources, 5 U.S.C. 552(b)(7)(D), confirm that Congress's use of the term "any individual"—without textual qualification—is not limited to at-risk individuals who are "identifiable" in advance. Cf. *CIA* v. *Sims*, 471 U.S. 159, 169 n.13 (1985) (similarly relying on Privacy Act to construe FOIA). Respondents do not respond to those arguments.

Notably, respondents do not dispute that the ordinary meaning of "any" is expansive (Pet. 17), arguing instead (at 14-15) that the Court has interpreted the word "in a limited manner where the context has *so demanded*." Br. in Opp. 15 n.8 (emphasis added). Yet respondents fail to explicate what aspects of the context of Exemption 7(F) call for imposing an extra-textual restriction on the statute's natural, capacious meaning. In these circumstances, this Court should reject both respondents' and the Second Circuit's efforts to redefine the meaning of the word "any."

b. Respondents contend (at 11-14) that the court of appeals' interpretation is justified because it prevents the government from circumventing the "safeguards and standards" necessary to withhold documents under FOIA Exemption 1, 5 U.S.C. 552(b)(1), which applies to classified records. Respondents assert (at 13) that the government's interpretation of Exemption 7(F) would improperly establish "a different, much lower standard for withholding information on national security grounds" than Exemption 1 does. That contention is meritless.

First, respondents' premise is wrong. The government here is not withholding records "on national security grounds." It is withholding records under Exemption 7(F) because their disclosure reasonably could be expected to endanger the lives and physical safety of individuals. That is a basis for withholding distinct from harm to the "national security" that would warrant classification under Executive Order 12,958 and withholding under Exemption 1. Accordingly, Exemption 7(F) often will apply when Exemption 1 does not, and vice versa. The question at issue is not whether the photographs meet the requirements of the classification Executive Order regarding national security, but instead whether the disclosure of those photographs

will endanger individuals. That is precisely the harm Exemption 7(F) addresses.

Moreover, this Court has declined to read Exemption 1 to restrict the scope of FOIA's other exemptions. In *Sims*, the Court construed Exemption 3, 5 U.S.C. 552(b)(3), to permit the CIA to withhold records concerning intelligence sources and methods even though the government had *declined* to reclassify the (then-declassified) records to trigger Exemption 1. See 471 U.S. at 166-177; see also *id.* at 184 n.3 (Marshall, J., concurring in the result). Justice Marshall specifically advocated interpreting Exemption 3's scope in light of Exemption 1, and stated that the Court's contrary reading "enables the [government] to avoid making the showing required under the carefully crafted balance embodied in Exemption 1 and thereby thwarts Congress's effort to limit the [government's] discretion." *Id.* at 189; see *id.* at 182-193. Seven Members of the Court were unpersuaded by that argument, which respondents repackage here. Nothing in Exemption 1 warrants restricting or otherwise altering Exemption 7(F)'s scope as written. See Pet. 25.[1]

2. Respondents contend (at 8, 17) that the government's interpretation of Exemption 7(F) would "turn FOIA on its head" by providing "the greatest protection against disclosure to records that depict the most egregious

---

[1] Respondents' view (at 12) that the government's reading would improperly permit the government to evade the "safeguards and standards" for classification is also undermined by the ability of the Executive to change those standards. Exemption 1 authorizes the Executive to determine the "criteria" for classifying information by "Executive order." 5 U.S.C. 552(b)(1). Because Exemption 1 does not preclude the Executive from changing the criteria for classification, the standards existing at any given time are an inappropriate guide for interpreting other FOIA exemptions.

abuses." To the contrary, the government insists on nothing more than that Exemption 7(F) applies when the requisite risk of death or physical injury is present. The danger to lives and safety that triggers the exemption may or may not be correlated with governmental misconduct. And, in any event, the court of appeals' decision itself does not turn on the degree of governmental misconduct, but instead would authorize withholding regardless of this factor so long as an agency can identify at-risk individuals with reasonable specificity. Respondents' apparent support for a balancing approach that would weigh the asserted public interest in revealing government misconduct against the risk of harm resulting from disclosure thus finds as little support in the approach of the Second Circuit as in the text of the statute. See Pet. App. 5a, 40a (rejecting balancing approach).[2]

The court of appeals' insistence on identification of at-risk individuals imposes a limitation on Exemption 7(F)'s protective scope similar to the one Congress eliminated from the statute in 1986. Pet. 26; cf. 130 Cong. Rec. 3502 (1984) (statement of Sen. Hatch). Both respondents and the court of appeals fail to explain why Congress would have wanted to protect only those victims who are identifiable in advance. Congress made clear that the standard in Exemption 7(F)—"could reasonably be expected to endanger"—establishes "the degree of risk of harm from disclosure which must be shown to justify withholding." S. Rep. No. 221, 98th Cong., 1st Sess. 23 (1983); see Pet. 18-19; cf.

---

[2] The public interest in disclosure here, moreover, is diminished by the public disclosure of the Army's underlying investigatory reports for all 21 responsive photographs at issue. Pet. 6-7 & nn.4-5, 15. (The petition (at 6) contains a typographical error and should state that "[a]ll 21 photographs," rather than "[a]ll 29 photographs," are in reports that were publicly released with redactions.).

Pet. App. 33a n.10. So long as a FOIA disclosure sufficiently risks the lives or physical safety of individuals under that standard, the matter of prior identification is irrelevant: Congress would have had no reason to protect individuals whom a federal agency could identify in advance with "reasonable specificity" while disregarding the dangers to individuals not specifically identifiable when Exemption 7(F) is invoked. Insofar as the purpose of the Exemption is concerned, identifiable and non-identifiable victims are identically situated. It therefore is not surprising that Congress declined to distinguish between them.

Significantly, respondents do not dispute that the Second Circuit's reasoning would require the disclosure of records *certain* to cause the death of numerous individuals if an agency were unable to identify the individual victims sufficiently in advance. Pet. 16-17. The Congress that enacted broad protection for the life and safety of "any individual" would not have countenanced that result. See Pet. 26-27, 30 (explaining that the 1986 amendment was intended to protect "anyone" whose life or physical safety was sufficiently endangered).

3. Respondents' reliance on legislative history is unavailing. Respondents claim that Congress intended Exemption 7(F) to protect against "specific threats to particular individuals arising out of law enforcement investigations." Br. in Opp. 18 (quoting Pet. App. 24a)[3]. But the 1986 amendment to Exemption 7(F) specifically deleted its prior textual restriction to law enforcement personnel,

---

[3] Respondents heavily rely (at 19-20) on legislative statements regarding the need to protect "informants." Such statements, however, concern amendments to a different subparagraph of Exemption 7—Exemption 7(D)—which Congress modified to provide greater protection for informants than Exemption 7(F)'s protection for individuals generally. See 132 Cong. Rec. 26,769, 26,771, 29,619 (1986).

making clear that Congress wanted Exemption 7(F)'s safeguarding of life and physical safety to extend beyond individuals with a "law enforcement" connection. Exemption 7(F), as its history reflects, is intended to protect "anyone" subject to a sufficient risk of harm from disclosure of the records it covers. Pet. 26-28.

Moreover, the court of appeals' extra-textual requirement of victim specificity does not follow from respondents' apparent view (at 18) that Congress intended to focus on protecting "persons associated with law enforcement investigations." The court's victim-specificity requirement is orthogonal to respondents' focus on victims associated with law enforcement: The court's requirement would encompass some but not all of those victims, as it would include some but not all victims having no relationship to law enforcement.

Respondents' assertion (at 21) that Congress intended its 1986 amendments to have only a "limited effect" on the scope of Exemption 7(F) does not withstand scrutiny. The full statement of the Deputy Attorney General from which respondents quote in fact supports the government's position. Deputy Attorney General Carol Dinkins was not addressing Exemption 7(F), but instead Exemption 7 more generally when she said the statutory language would be "modified slightly," and she was referring to the scope of two amendments unrelated to the language in dispute between the parties here. 131 Cong. Rec. 248 (1985) (discussing S. 774, 98th Cong., 1st Sess. (1983)). The Deputy Attorney General made clear that FOIA reflects a "balance" in which the "interest in protecting [certain] information from disclosure often can be even more important" than "the goal of openness," and she therefore specifically recommended, in another part of her statement, an amendment to Exemption 7(F) to expand its protection for "law enforce-

ment" personnel to give "similar protection to the life of *any other person*." *Id.* at 247-248, 253 (emphasis added). That broader understanding of Exemption 7(F) is repeatedly reflected in statements of former Attorneys General while the amendment was under consideration and in authoritative guidance provided after enactment. Pet. 26-27, 29-30. Respondents disregard all those statements.

Respondents' reliance (at 21) on the remarks of Representative English, who supported less expansive amendments than Congress ultimately adopted, are of little use in interpreting Exemption 7(F).[4] After those remarks, Senator Hatch—the "principal author" and sponsor of the Exemption 7 amendments—emphasized that "[t]here should be no misunderstanding" that the relevant amendments "are intended to broaden the reach of this exemption" and "ease considerably [the government's] burden in invoking it." 132 Cong. Rec. 31,423-31,424 (1986); see Pet. 23-24.

4. Respondents' observation (at 21-24) that most Exemption 7(F) cases have involved records identifying the individuals at risk from disclosure provides no support for the Second Circuit's decision to require reasonably specific victim identification in every case. And indeed, respondents' treatment of the cases presenting Exemption 7(F) questions similar to the issue presented here reinforces the conclusion that the Second Circuit's imposition of this requirement is unprecedented. Pet. 30-31. The best respondents can do is to label one decision "anomalous" (while identifying no contrary authority) and state that other rulings are factually different. Br. in Opp. 21, 24 n.11. But in

---

[4] See 132 Cong. Rec. 29,616 (1986) (statement of Rep. English) (stating that he was "not in complete agreement with the Senate changes" to the bill, "would not have chosen this time or this bill" to amend FOIA, and believed concerns voiced by the Department of Justice "about the negative effects of the FOIA were greatly exaggerated").

all those prior cases, courts have held Exemption 7(F) to apply when the government sufficiently established that disclosure could reasonably be expected to endanger the lives and safety of individuals—without requiring the at-risk individuals to be identified in advance with reasonable specificity. That central holding of the cases, which respondents do not contest, is what makes those cases relevant to the dispute at issue here.

5. Respondents ultimately rest on the contention (at 25-27) that further review should be denied because it will delay public disclosure of the photographs at issue. Yet respondents do not dispute that lives are at risk from disclosure, nor do they disavow the court of appeals' assumption (at least for purposes of this appeal) that the government sufficiently established the threshold level of danger to trigger Exemption 7(F). Especially in light of this danger of death and injury, respondents' assertion that certiorari should be denied because of the normal delay associated with this Court's review is seriously mistaken.

This litigation has been pending for five years and was argued on appeal nearly three years ago. The relatively short additional time associated with review by this Court is fully warranted given the stakes. Even the court of appeals appears to have rejected respondents' claimed injury from delay, ordering its mandate to be recalled and held pending this Court's resolution of the present petition. Pet. 14.

The importance of this case and the need for further review are apparent. The President of the United States and the Nation's top military officers have concluded that the disclosure ordered here would significantly risk the lives and safety of American and Coalition personnel and civilians. Before those individuals are forced to bear that risk, this Court's review is warranted.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

SEPTEMBER 2009